90-674

NO.

In the Supreme Court of the United States

OCTOBER TERM 1990

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, WILLARD CARLOCK, SR., PETER BABIN III, DON SCHIRO AND C.J. LAIRD

Petitioners

VERSUS

ROBERT GUIDRY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a union member's rights secured by Section 101(a)(1) and (2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(1) and (2), are "infringed" within the meaning of §102 of the LMRDA, 29 U.S.C. §412, by the discriminatory operation of a union's hiring hall, where the right to be referred to employment is not an incident of union membership.

2) Whether the LMRDA authorizes an award of punitive damages to a prevailing plaintiff.

3) Whether the LMRDA authorizes an award of damages for emotional distress and if so, what type of evidence will constitute a sufficient basis for the awarding of such damages.

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Petitioners, International Union of Operating Engineers, Local 406 ("the Union"), Willard Carlock, Sr., Peter Babin, III, Don Schiro and C.J. Laird, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit on the question presented.

I. OPINIONS BELOW

This petition arises from the opinion of the Court of Appeals for the Fifth Circuit granting Guidry's petition for panel rehearing, which is reported at 907 F.2d 1491.(A1).[1]

[1] References to the Appendix will be "A-____."

The court of appeals' decision on remand from this court (493 U.S. ____, 110 S.Ct. 1465) (A9) is reported at 902 F.2d 335 (1990) (A6). The initial opinion of the court of appeals is reported at 882 F.2d 929 (1989) (A10). The district court's opinion is reported at 669 F.Supp. 763 (W.D.La. 1987). (A42).

II. JURISDICTION

On July 25, 1990, the Court of Appeals granted Guidry's petition for panel rehearing and issued its opinion on rehearing. This petition is filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

III. STATEMENT OF STATUTES INVOLVED

The questions presented for review involves Sections 101 (a)(1) and (2) and 102 of the Labor-Management Reporting and Disclosure Act ("the LMRDA"), 29 U.S.C. §§411 (a)(1) and (2) and 412, the text of which are set forth in the appendix hereto.

IV. STATEMENT OF THE CASE

Robert Guidry was a member of the Union, which is a state-wide union with six district offices, including one located in Lake Charles, Louisiana. Pursuant to various collective bargaining agreements, the Union operates hiring halls at its main office in New Orleans and district offices, through which it refers both members and non-members of the Union to construction employment. The Union maintains out-of-work lists at its offices of individuals who wish to be referred to jobs. The lists contain names in the order applicants notify the Union he or she is available for work. In Louisiana, it is unlawful to condition

employment upon union membership, or the payment of an agency-fee.

Guidry had a history of opposing incumbent Union officers, including Carlock and Laird, the business agents appointed to operate the Lake Charles district office and its hiring hall. Guidry sought employment through the Lake Charles hiring hall. Carlock "exploited and, at times, disregarded entirely the hiring hall procedures to enrich his confederates to the detriment" of Guidry (A53). The district court concluded that "manipulation of hiring hall procedures to suppress participation in union activities and opposition to union management and policies constitutes violations of §411(a)(1) and (2)." (A72).

The Court of Appeals affirmed substantially all of the district court's holdings. It concluded that discipline within the meaning of sections 101(a)(5) and 609 had occurred because "Guidry's name was repeatedly skipped over on the out-of-work list in retaliation for his outspoken opposition to Union leadership" (A32).

After denial of rehearing, the Union petitioned this court for a writ of certiorari, which was granted (A9). The Fifth Circuit's judgment was vacated summarily and remanded for reconsideration in light of *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. ___(1989).

On remand, the Fifth Circuit directed the district court to determine "whether, and to what extent" the Union as an entity was responsible for the hiring hall discrimination against Guidry. (A7,8).

Guidry petitioned for panel rehearing and rehearing en banc. The Fifth Circuit granted the petition for panel rehearing, concluding that "*Breininger* does not alter the

district court's judgment regarding the defendants' violations of Guidry's equal rights under Section 101(a)(1) and right to free speech under Section 101(a)(2). A litigant may successfully seek redress under Section 102 for an infringement of these LMRDA right even if no unlawful 'discipline' is shown." (A4).[2] It remanded to the district court for consideration of damages based upon its earlier finding that the district court applied an incorrect statute of limitations period, and to permit Guidry to press his §101(a)(5) claim if he so desired. (A2,4).

V. JURISDICTION OF THE DISTRICT COURT

Jurisdiction in the district court, the United States District Court for the Western District of Louisiana, Lake Charles Division, was based upon sections 101 and 609 of the LMRDA, 29 U.S.C.§§411 and 529.

VI. REASONS FOR GRANTING THE WRIT

A. HIRING HALL DISCRIMINATION IS NOT ACTIONABLE UNDER TITLE I OF THE LMRDA

In *Breininger,* 110 S.Ct. 424, this court, in concluding that the discriminatory operation of a hiring hall does not constitute "discipline" under Sections 101(a)(5) and 609 of the LMRDA (29 U.S.C. §§411(a)(5) and 529), did not pass upon the petitioner's claim "that certain of his rights secured by the LMRDA were 'infringed' by respond-

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[2] F.R.App.P. 35(b) and Fifth Circuit Rule 35.3 prohibit the submission of a brief in opposition to a petition for panel or en banc rehearing, unless requested by the court. The court did not solicit a position from the Union prior to granting the petition for rehearing and issuing its decision.

ent's conduct, in violation of Section 102" because the claim had not been litigated by the courts below. 110 S.Ct. at 440 n.28. This open question is squarely presented by this case. Because litigation over the operation of hiring halls is recurring in every circuit, and in the past has proceeded under allegations that such conduct violates, *inter alia*, Section 101(a)(5), the extant question is appropriately resolved at this time.[3]

Section 102 "provides independent authority for a suit against a union based on an alleged violation of Title I of the Act." *Finnegan v. Leu*, 456 U.S. 431, 439 (1982). Section 102 protects "rights secured by the provisions" of Title I which "have been infringed." "[A] litigant may maintain an action under §102 — to redress an 'infringement' of 'rights secured' under Title I — without necessarily stating a violation of §609." *Finnegan*, 456 U.S. at 439.[4]

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[3] Prior to the Court's decision in *Breininger*, most courts of appeals considered that employment-related reprisals, such as hiring hall discrimination, constituted discipline under Section 101(a)(5), as did the court of appeals in the present matter, without considering whether a cause of action existed under §102. *See Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 122-123 (6th Cir. 1985), *cert. denied* 475 U.S. 1017 (1986); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1378-79 (8th Cir. 1978); *Duncan v. Peninsula Shipbuilders Association*, 394 F.2d 237, 239 (4th Cir. 1968); *Moore v. Electrical Workers Local 569*, 653 F.Supp. 767, 769-72 (N.D. Cal. 1987). Only the *Murphy* court considered the issue, and, reading §101(a)(1) and (2) more broadly than §609, concluded they created such a cause of action, because it constituted "indirect interference" with Title I rights. 774 F.2d at 123. Petitioners submit this holding overreaches the narrower scope of §102, as shown above.

[4] The phrase "otherwise discipline" which appears in both Sections 101(a)(5) and 609 have the same meaning. *Breininger*, 110 S.Ct. at 438 n.23, citing *Finnegan*, 456 U.S. at 439 n.9. The court interpreted the term "discipline" to mean only punishment authorized by a union as a collective entity to enforce its rules undertaken under color of the union's

Section 609 "applies to disciplinary action taken in retaliation for the exercise of *any* right secured under the Act, where as §102 protects only rights secured by Title I." (emphasis in original). *Finnegan,* 456 U.S. at 439 n.10. The scope of Section 102, and the statutory term "infringes," in Section 102 is indisputably narrower in scope than Section 609. *Allen v. Allied Plant Maintenance Company of Tennessee,* 636 F.Supp. 1090, 1097 (M.D. Tenn. 1986) (alleged employment related reprisal for dissident union activity is not actionable under Section 101(a)(2), because plaintiff is not deprived of any privilege or benefit incident to union membership).

Because of the often ambiguous and at time unenlightening legislative history of the LMRDA, *see Wirtz v. Glass Bottle Blowers, Local 153,* 389 U.S. 463, 468 (1968), courts will often look at the underlying rationale of the statute for aid in rendering an interpretation. *See Finnegan,* 456 U.S. at 435-36; *Wirtz,* 389 U.S. 468 n.6. Sections 101 and 102 were intended to prevent sanctions "which in many instances" could mean "loss of union membership *and in turn loss of livelihood.*" (emphasis supplied.) *Finnegan,* 456 U.S. at 435. Thus, *inter alia,* the concern addressed was a direct sanction against the member, which affected his status as a member, which "in turn" might result in "loss of livelihood." It did not, however, implicate the ad hoc use of a hiring hall by a business manager, which infringes upon a member's employment status, *Allen,* 636 F.Supp. at 1097, but not his status as a member.[5]

Footnote 4 continued.
right to control the member's conduct "rather than ad hoc retaliation by individual union officers." 110 S.Ct. at 439, 440 and n.15.

[5] This overriding distinction has been recognized by two courts of appeal, albeit in the context of alleged violations of Sections 101(a)(5) and

Nor does this Court's recent decision in *Sheet Metal Workers v. Lynn*, 109 S.Ct. 639 (1989), compel the conclusion that the discriminatory operation of a hiring hall states a cause of action under the LMRDA. There, the removal of a union officer because of his opposition to the international union's actions was found to violate Title I because it affected his status as a member — i.e., although his status *as a member* permitted him to hold union office, his opposition resulted in the infringement of his right as a member to hold union office. Moreover, the officer's removal impacted directly on the membership's Title I right to be represented by their duly elected representative. Thus, the retaliatory action affected membership status and infringed upon a right or benefit incident to union membership, unlike referral through a hiring hall.

Here, the Fifth Circuit reinstated its earlier affirmance of the district court that the hiring hall discrimination violated §101(a)(1) and (2) and §102, with the conclusory assertion that it created such a cause of action. But Guidry's status as a member, and his rights a member secured by Title I were not affected by the discriminatory operation of the referral system. He remained free to vote in all elections, to speak freely as he had always done, and to receive all benefits incident to his membership.

Footnote 5 continued.

609. *Turner v. Boilermakers Local 455*, 755 F.2d 866, 869-70 (11th Cir. 1985); *Hackenburg v. Boilermakers*, 694 F.2d 1237, 1239 (10th Cir. 1982). Referral through a hiring hall is not benefit incident to union membership. *Turner*, 755 F.2d at 869; *Hackenburg*, 694 F.2d at 1237, and, of course, employment itself is not a benefit incident to union membership. *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963); *NLRB v General Motors Corporation*, 373 U.S. 734 (1963) (explaining interplay between Section 8(a)(3) and Section 14(b) of the Labor Management Relations Act, 29 U.S.C. §§158(a)(3) and 164(b)).

Although Title I does not provide a cause of action to a member affected by the discriminatory operation of the hiring hall, the member is not left without a means to vindicate his rights. *Breininger* made clear that the affected individual has a private cause of action under Section 301 of the LMRA, 29 U.S.C. §185, in addition to relief before the National Labor Relations Board for a violation of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(A). 110 S.Ct. at 436.

B. THE AWARD OF PUNITIVE DAMAGES UNDER THE LMRDA CONFLICTS WITH RECENT DECISIONS OF THIS COURT CONCERNING RELATED STATUTES, AND IMPOSES THE RISK ON UNION MEMBERS OF THEIR UNION BEING CRIPPLED BY SUCH AN AWARD

The Court of Appeals reinstated its prior damage award on remand. In its initial decision (A10), relying on its precedent, the Fifth Circuit affirmed the award of punitive damages under the LMRDA against the Union and Babin. *Parker v. Steelworkers Local 1466,* 642 F.2d 104 (5th Cir. 1981) and *Boilermakers v. Braswell,* 388 F.2d 193 (5th Cir.), *cert. denied,* 391 U.S. 935 (1968). *Parker* and *Braswell,* hold that where a union acts with actual malice or reckless or wanton indifference to the rights of a plaintiff, punitive damages may be awarded. The award of punitives against the Union stemmed from the ad hoc actions of Carlock and Laird, primarily the operation of the hiring hall and income lost thereby. Babin was sanctioned for failing to monitor adequately the actions of Carlock and Laird.

The LMRDA is silent on awards of punitive damages. However, in *International Bhd. of Electrical Workers v. Foust,* 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979), the court held that punitive damages could not

be assessed under section 301 of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. §185, against a union which breaches its duty of fair representation, whether the action flowed from the National Labor Relations Act, 29 U.S.C. §151, *et seq.*, or the Railway Labor Act, 45 U.S.C. § 151 *et seq.* In rejecting the argument that punitive damages are appropriate under section 301 because "actual damages caused by a union's failure to pursue grievances may be *de minimis*" and therefore "a strong legal remedy is essential to . . . inhibit union misconduct," *id.*, 442 U.S. at 48, 99 S.Ct. at 2126, the court concluded that punitive damage awards "could unsettle the careful balance of individual and collective interests . . . . in the unfair representation area." *id.* Punitive damages may result in windfall recoveries for plaintiffs with little actual damages, and "such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is too great a price for whatever deterrent effect punitive damages may have." *id.*, 442 U.S. at 50-51, 99 S.Ct. at 2127. This rationale applies with equal force to suits brought under the LMRDA, *Foust*, 442 U.S. at 59, 99 S.Ct. 2131 (Blackmun, J. concurring in the result, with whom Burger, C.J., and Rehnquist and Stevens, J.J., joined).

Noting the LMRDA's silence on punitive damages, the Fifth Circuit discovered that there is "nothing in the legislative history of the LMRDA which touches directly on this question." *Braswell*, 388 F.2d at 200. The absence of a statutory provision authorizing a plaintiff to recover punitive damages or, *inter alia*, of any legislative history indicating Congress intended to create a private right of action for punitive damages, lead this court to conclude that punitive damages were not available under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

U.S.C. §1001 *et seq. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144-146, 148, 105 S.Ct. 3085, 3091-93, 87 L.Ed. 2d 96 (1985). The remedial provision of the LMRDA, section 102, is similar to ERISA's remedial provision for breaches of fiduciary duties to plan participants, 29 U.S.C. §1109.

Similar results were reached in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940) (holding the NLRB could not assess punitive damages as it was not expressly authorized to do so by Congress), and *Teamsters v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (holding punitive damages could not be recovered under section 303 of the LMRA, 29 U.S.C. §187, for a union's impermissible secondary boycott). Because the remedial provisions of Title VII of the Civil Rights Act of 1964 are patterned after the NLRA, *Ablemarle Paper Company v. Moody*, 422 U.S. 405, 419, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), it appears punitive damages are not available under Title VII.[6]

Although the Fifth Circuit has stated that Congress' declaration of the purpose of LMRDA — "to eliminate or prevent improper practices on the part of labor organizations" — justified the award of punitive damages, *Braswell*, 388 F.2d at 200, ERISA was also enacted to curb abuses affecting employees — *inter alia*, the termination of pension plans by employers which disenfranchised employees from their expected pensions. *See PBGC v. R.A. Gray Co.*, 467 U.S. 717, 720-21, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601 (1984); *Alessi v. Raybestos-Manhattan, Inc.*,

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[6] Compare the Fair Labor Standards Act, 29 U.S.C. §§216 and 217, which authorizes liquidated damages, incorporated into the Age Discrimination in Employment Act, 29 U.S.C. §626(b).

401 U.S. 504, 510-11, 101 S.Ct. 1895, 1899-1900, 68 L.Ed.2d 402 (1981).[7]

Whether punitive damages are available under the LMRDA has a far reaching impact upon labor organizations. Punitive damages may be awarded by juries "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . . Community hostility toward unions, management or minority views can thus find expression in punitive awards." *Foust*, 442 U.S. 50 n.14, 99 S.Ct. 2127 n.14.[8] The issue is an important question of federal law which was not decided by *Foust*, 442 U.S. at 47 n.9, 99 S.Ct. 2125 n.9, and which should now be settled by the court.[9]

C. THE LMRDA DOES NOT AUTHORIZE AN AWARD OF DAMAGES FOR EMOTIONAL DISTRESS

Presented with an issue of first impression for the

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[7] Union officers have fiduciary duties to the membership similar to the duties imposed upon ERISA trustees, under section 501 of the LMRDA, 29 U.S.C. §501. *See Bloom v. Teamsters*, 752 F.2d 1312 (9th Cir. 1984).

[8] Alleged violations of sections 101 and 102 have been tried to juries, as have damages issues. *See, e.g., Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373 (8th Cir. 1978); *Keene v. Operating Engineers Local 624*, 569 F.2d. 1375 (5th Cir. 1978).

[9] Although most courts of appeals reaching this issue have found punitive damages appropriate under the LMRDA, *Braswell*, 388 F.2d 193; *Cook v. Orange Belt Dist. Council*, 529 F.2d 815 (9th Cir. 1976); *Morrissey v. NMU*, 544 F.2d 19 (2d Cir. 1976), the Sixth Circuit has questioned the availability of such damages. *McGraw v. Plumbers and Pipefitters*, 341 F.2d 705 (6th Cir. 1965). The courts of appeals were also virtually unanimous in finding punitive damages available under the LMRA, which this court rejected in *Foust*, 442 U.S. at 58, 99 S.Ct. at 2131 (Blackmun, J., concurring in the result).

Fifth Circuit, the Court of Appeals, relying on precedent of other courts of appeal, summarily concluded that damages for emotional distress are recoverable under the LMRDA. (A37). It imposed a broad "actual injury" requirement, which allows "lost wages as well as physical manifestations of emotional distress [to] serve[ ] as sufficient indication of actual injury." (A38, 39). The district court awarded such damages based upon lost wages only; i.e., those wages lost through the discriminatory operation of the hiring hall. (A39, 77).

Petitioners submit damages for emotional distress are not recoverable under the LMRDA. Section 102 of the LMRDA, 29 U.S.C. §412, provides in pertinent part:

> Any person whose rights secured by the provcisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in the district court of the United States for *such relief* (including injunctions) *as may be appropriate.* (emphasis added).

The statute is silent on the award of emotional distress. In the seminal case on this issue, *Boilermakers v. Rafferty,* 348 F.2d 307 (9th Cir. 1965), the court of appeals noted that the only item of legislative history pertinent to the issue is a remark by Senator Goldwater:

> Although the Bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the Bill does not grant him, even where successful in his suit, reasonable counsel fee or other costs.

2 Leg. History, LMRDA 1281.

In *Russell*, 473 U.S. at 138-139, 146, 105 S.Ct. at 3088-89, 3092, the court found that similar language in section 409(a) of ERISA, 29 U.S.C. §1109 (a), did not authorize "extra -contractual" damages, such as punitive damages and emotional distress.[10] The Court of Appeals has held that Title VII of the Civil Rights Act of 1964 does not permit recovery for emotional distress damages, even though the statute authorizes the court "to order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). *See Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988). *Accord, Shah v. Mt. Zion Hospital*, 642 F.2d 268 (9th Cir. 1981); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *DeGrace v. Rumsfield*, 614 F.2d 796 (1st Cir. 1980). *Contra Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267 (8th Cir. 1981).

In *Farmer v. Carpenters Local 25*, 430 U.S. 290, 305-06, 97 S.Ct. 1056, 1066, 51 L.Ed.2d 338 (1977), the court found that in certain circumstances, a state cause of action against a union for intentional infliction of emotional distress is not preempted by the National Labor Relations Act. It emphasized, however, that this cause of action "cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which

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[10] Section 409(a) subjects a fiduciary who breaches his duty to the plan "to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. . .Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Id.*, 430 U.S. at 305, 97 S.Ct. at 1066. The principles enunciated in *Russell, Farmer,* and by the majority of the courts of appeals concerning Title VII, are equally applicable to the LMRDA. The LMRDA, like ERISA and Title VII, does not expressly authorize recovery of damages for emotional distress, and its legislative history is virtually silent on the issue. The same construction is warranted for the LMRDA. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. . . The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Russel,* 473 U.S. at 147, 105 S.Ct. at 3093.

Just as with punitive damages, this issue is worthy of resolution by the court because of its potential for significant impact upon union coffers. As noted *supra,* LMRDA claims are often tried to a jury. A jury by imposition of such an award may, as the Court of Appeals noted, deprive other union members of effective representation. (A37).

Moreover, with respect to proof of injury, there is a split between the circuit courts of appeals. The Courts of Appeals for the Fifth and Ninth Circuits do not require proof of a physical manifestation of emotional distress; they require only a showing of lost wages and essentially infer emotional distress. (A38,39). The Court of Appeals for

the Second Circuit requires a showing of a physical manifestation of injury, "based upon the plaintiff's physical condition or medical evidence." *Rodonich v. House Wrecker's Union Local 95*, 817 F.2d 967, 978 (2d Cir. 1987). Loss of income alone is insufficient in the Second Circuit's view to support damages for emotional distress because of the potential impact on a union's treasury occasioned by damages for emotional distress where no actual injury to the plaintiff has occurred. 817 F.2d at 977-78.

VII. CONCLUSION

Based upon the foregoing, a writ of certiorari to the Court of Appeals for the Fifth Circuit is warranted.

Respectfully submitted,

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